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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted]14

REPUBLIC STEEL CORPORATION,
Petitioner,

CENTRAL COUNCIL OF STEEL PLANTS, NORTHERN DISTRICT, REPUBLIC STEEL CORPORATION,
Intervening Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

STEEL WORKERS ORGANIZING COMMITTEE,
Intervening Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for The Third Circuit.

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I. The decision of the court below that the alleged unfair labor practices of petitioner caused the strike, and, therefore, justified the general reinstatement of substantially all striking employees with back pay "to effectuate the policies of the Act," (a) does not follow the applicable decisions of this Court requiring that the Board's order be supported by substantial evidence, *N. L. R. B. v. Sands Manufacturing Co.*, 306

U. S. 332; *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292; (b) is in conflict with the decision of this Court in *N. L. R. B. v. Sands Manufacturing Co., supra,* and the decision of the Fifth Circuit Court of Appeals in *Peninsular & Occidental S. S. Co. v. N. L. R. B.*, 98 Fed. (2d) 411, in that it depends for its support upon the alleged statements of minor supervisory employees with no authority to determine petitioner's labor policies; and (c) sanctioned the application by the Board of its "background" technique for finding facts in a new way so opposed to the laws and rules of evidence that it should be supervised by this Court

II. The decision of the court below as to the legal effect and significance of violence by individual strikers, some of them convicted of crimes, and holding that Congress, when it enacted Section 13 of the Act, 29 U. S. C. A., Section 163, preserving the right to strike, intended to sanction violence by strikers in a labor dispute, and contemplated that the commission of crimes and the use of violence in furtherance of a strike by strikers should not deprive them of the possibility of reinstatement, is in conflict with the decision of this Court in *N. L. R. B. v. Fansteel Metallurgical Corporation,* 306 U. S. 240, and in conflict with the decision of the First Circuit Court of Appeals in *N. L. R. B. v. Bradford Dyeing Association,* 106 Fed. (2d) 119 .....

III. The court below erroneously decided an important question of federal law, relating to the construction and application of a federal statute, which has not been, but should be, settled by this Court, when it held that Section 6 of the Norris-LaGuardia Act (29 U. S. C. A., Sec. 106), providing that no member of any association participating in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual members except upon clear proof of actual participa-

tion in such acts, applied to this case, and prohibited the court below from considering petitioner's contention that strikers could not properly be ordered reinstated generally by the Board to effectuate the policies of the Act, in view of the principles announced by this Court in *N. L. R. B. v. Fansteel Metallurgical Corp., supra,* because they were all members of an illegal combination and conspiracy and, as such, responsible for the acts of violence committed, individually and collectively, in pursuance thereof 42

IV. The court below erroneously decided an important question of federal law, which has not been but should be settled by this Court, when it sustained the Board's order, sections 2(b) (c) and (g), requiring petitioner to reimburse fiscal agencies for work relief projects for payments made by them to strikers and other employees for services actually performed on so-called work relief projects, which order is beyond the Board's jurisdiction, or, at least, an abuse of its discretion and punitive in character, and deprives petitioner of its property without due process of law 44

V. The decision of the court below requiring petitioner to make whole certain of its employees at its Canton tin plate mill and Massillon works plants who were found to have been locked out for a short time but who were re-employed prior to the strike and the Board's hearing, for the pay lost during such alleged lockouts, when the Board and the court below did not, and could not, reinstate such employees in connection with this pay back order, is in conflict with the decision of the Ninth Circuit Court of Appeals in *N. L. R. B. v. Carlisle Lumber Co.,* 99 Fed. (2d) 533; and such holding of the court below is also in conflict with the decision of this Court in *N. L. R. B. v. Sands Manufacturing Co.,* 306 U. S. 332, in that it depends for its support upon alleged statements by petitioner's minor super-

visory employees, not authorized to determine its labor policies, and, therefore, not substantial evidence 48

VI. The court below erroneously decided an important question of Federal law, which has not been, but should be, settled by this Court, when it approved and enforced Section 2(f) of the Board's order by which petitioner is required to reinstate strikers in certain of its plants in Ohio, and at Monroe, Michigan and at Pittsburgh and Beaver Falls, Pennsylvania, located in some instances as much as approximately 130 miles apart, and at new plants of petitioner acquired since the date of the hearing, *regardless of their place of former employment* 51

VII. The decision of the court below, holding that certain employees of petitioner who were not named in the charges filed by the Board could be ordered reinstated, with back pay, and finding that the strike was caused by unfair labor practices other than those alleged in the charges as causes of the strike, is in conflict with the decision of the Second Circuit Court of Appeals in *N. L. R. B. v. Hopwood Retinning Company, Inc.*, 98 Fed. (2d) 97 53

VIII. The court below decided an important question of Federal law which as not been, but should be, settled by this Court, when it upheld the Board's finding that petitioner had committed unfair labor practices as defined by Section 8 (3) of the Act when it discharged and refused to reinstate twenty-six of its former employees, notwithstanding that there was no evidence tending to show that such acts actually discouraged membership in a labor organization by either causing employees to withdraw therefrom or to refrain from joining it 54

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* See Appendix, pp. 60-67, for pertinent Sections quoted in full.

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In the Supreme Court of the United States

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No. .....

REPUBLIC STEEL CORPORATION,
Petitioner,

CENTRAL COUNCIL OF STEEL PLANTS, NORTHERN DISTRICT, REPUBLIC STEEL CORPORATION,
Intervening Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

STEEL WORKERS ORGANIZING COMMITTEE,
Intervening Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for The Third Circuit.

Republic Steel Corporation prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit entered on January 2, 1940, granting the petition of the respondent, National Labor Relations Board (herein the Board), for the enforcement of its order against petitioner, Republic Steel Corporation.

OPINIONS BELOW.

The findings of fact, conclusion of law, and order of the National Labor Relations Board (R. II, 833-1109)* are reported in 9 NLRB 219. The opinion of the Circuit

* Roman and arabic numerals in parenthesis refer to volume and page, respectively, of the record, throughout.

Court of Appeals (R. VIII, 6277) is reported in *Republic Steel Corporation et al. v. N. L. R. B.*, 107 Fed. (2d) 472.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered January 2, 1940 (R. VIII, 6294). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Section 347, and Sections 10 (e) and (f) of the National Labor Relations Act, Title 29 U. S. C. A., Section 160.

QUESTIONS PRESENTED.

1. Whether the court below erred in enforcing the order of the Board requiring a general and indiscriminate reinstatement of practically all of petitioner's striking employees, when such order was predicated upon a finding that a strike at petitioner's plants involved herein was caused by petitioner's unfair labor practices, notwithstanding that such finding was based upon a clearly unwarranted application of the Board's method of "background" approach; was not supported by any substantial evidence, but depended for its support upon the statements of minor supervisory employees with no authority to determine or announce petitioner's labor policy; and despite the fact that the undisputed evidence disclosed that the sole cause of the strike was petitioner's concededly lawful refusal to sign a written collective bargaining contract presented to it by the Steel Workers Organizing Committee (herein SWOC) as a step in the drive of the Committee for Industrial Organization (herein CIO), to organize the nation's steel industry.

2. Whether, as was held by the court below,

(a) Congress, when it enacted Section 13 of the National Labor Relations Act (herein the Act), providing that nothing therein should be construed so as to interfere

with or impede or diminish the right to strike, contemplated that strikers might, in furtherance of the strike, commit violent and unlawful acts against their employer and other employees and still be eligible for reinstatement, *thus sanctioning the use of violence by strikers in a labor dispute;**

(b) under the Act, strikers actually convicted of crimes committed in furtherance of the strike, were, nevertheless, eligible for reinstatement;

(c) the rule laid down by this Court in *N. L. R. B. vs. Fansteel Metallurgical Corporation,* 306 U. S. 240, sanctions, in principle, the proposition that strikers may, in furtherance of a strike, commit violent and unlawful acts against their employer and other employees, and still be eligible for reinstatement;

(d) in determining which strikers should be denied reinstatement, due to their own misconduct, the Board could properly confine itself to a consideration of evidence disclosing the actual conviction of strikers of crimes committed in furtherance of the strike, and refuse to consider evidence of numerous violent and unlawful acts, committed by strikers in furtherance of the strike, not made the subject of criminal proceedings;

(e) in determining if it will effectuate the policies of the Act to order a general and indiscriminate reinstatement of strikers, the Board and the court below could disregard evidence that such strikers, as a group, generally and collectively, were parties to a combination and conspiracy to paralyze petitioner's business by violent and unlawful means and committed violent and unlawful acts in furtherance thereof.

3. Whether, as was held by the court below, Section 6 of the Norris-LaGuardia *"anti-injunction"* Act (29 U. S. C. A. Sec. 106) applies to a proceeding before the Board,

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* Emphasis throughout is ours unless otherwise indicated.

and an enforcement proceeding in the Court of Appeals, and prohibits the Board and the Court, in determining whether or not to reinstate strikers, from considering evidence, that strikers were all parties to an unlawful conspiracy to paralyze petitioner's business by violent and unlawful acts, and from considering petitioner's contention that all members of such illegal conspiracy were responsible for the unlawful acts committed in pursuance thereof whether or not they participated therein.

4. Whether, as was held by the court below, the Board, having ordered deduction from back pay of amounts paid by governmental work relief projects to strikers and certain other employees discharged by petitioner, for services actually performed by them on such projects, had jurisdiction to order petitioner, as it did, to reimburse such governmental work relief projects for the moneys so paid to such strikers and discharged employees.

5. Whether, as was held by the court below, the Board had jurisdiction to award back pay to certain of petitioner's employees, when in fact the Board and the court below did not and could not reinstate such employees in connection with said back pay order.

6. Whether, as was held by the court below, the Board properly required petitioner to make whole certain employees at its Canton Tin Plate and Massillon Works plants who were found by the Board to have been locked out for a few days, but who were reemployed prior to the strike and the hearing herein, for the pay lost during the period of such alleged lockouts, notwithstanding the Board's finding in this respect was not supported by any competent substantial evidence, but depended upon alleged statements by minor supervisory employees as to petitioner's policy dictating the shut-downs.

7. Whether, as was held by the court below, the Board had jurisdiction and discretion to order petitioner to offer

jobs to strikers in plants at which such strikers never were employed, some of which plants never came into existence until after the strike, and some of which plants, located in other states, were in no wise involved in the proceeding before the Board, thus granting to strikers rights greater than those possessed by non-striking employees.

8. Whether, as was held by the court below, the Board had jurisdiction to make an order requiring petitioner to reinstate a large and numerous group of strikers based upon a finding that the strike was caused, in part, by a long series of unfair labor practices by petitioner, notwithstanding that the charges filed with the Board, upon which the complaint herein is based, do not allege that such unfair labor practices were causes of the strike.

9. Whether, as was held by the court below, the Board had jurisdiction to order petitioner to reinstate with back pay certain of its former employees found to have been discriminatorily discharged or refused reinstatement because of their union activities both before and after the strike, notwithstanding that such findings were not supported by substantial evidence; that the charges filed by the Board did not allege that certain of such former employees had been so discharged or refused reinstatement; and that the evidence failed to disclose that the discharge of, or refusal to reinstate, all of such former employees had discouraged membership in a labor organization.

10. Whether petitioner was afforded a hearing in this proceeding as required by law and the Constitution of the United States.

11. Whether, as was held by the court below, the Board properly ordered petitioner to cease and desist from dominating and interfering with alleged company unions, and to withdraw all recognition therefrom, notwithstanding that the Board in determining this issue, failed to give consideration to evidence offered by petitioner that thousands of its employees had joined such unions of their own free will

and without being influenced in that regard by anything that was said or done by petitioner, its officers or agents.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act and the Norris-La Guardia Act are printed in the appendix to this petition.

STATEMENT.

The petitioner is engaged in the business of manufacturing steel and steel products with plants in Ohio, Michigan, Pennsylvania and elsewhere normally employing approximately 60,000 men. The Labor Board proceeding here involved related only to certain of petitioner's plants located in the State of Ohio normally employing approximately 40,000 men (R. II, 843, 844). Petitioner, in this proceeding, seeks review of an order of the Third Circuit Court of Appeals enforcing, with a slight modification, an order of the National Labor Relations Board, the details of which are discussed hereinafter. The facts are discussed in detail *infra*. To summarize:

As the Board found herein (R. II, 860), SWOC, an affiliate of CIO, began a campaign to organize petitioner's employees in June, 1936. Thereafter, SWOC obtained a written collective bargaining contract with the Carnegie-Illinois Steel Company and other United States Steel Corporation subsidiaries on March 17, 1937. Less than two weeks later, on March 30, 1937, SWOC forwarded a form of contract to petitioner requesting a conference. Subsequently, on May 3, 1937, SWOC repeated this request, and petitioner replied on May 5, 1937, stating that it would meet for collective bargaining purposes but saw no necessity of a signed contract. SWOC replied on May 6, 1937 stating that a conference was useless if any agreement made were not reduced to writing. Nevertheless, a conference was held on May 11th, 1937, at which time nego-

tiations broke down. On May 26th, 1937, an SWOC strike commenced at petitioner's plants involved in this proceeding as well as others of its plants.

This strike, which, together with the strikes against Bethlehem Steel Corporation, Inland Steel Company, and Youngstown Sheet & Tube Company, was greatly publicized in the summer of 1937, was carried on with great violence on the part of SWOC as detailed *infra,* pages 17 *et seq.* Employees remained in some of petitioner's plants and were besieged by armed picket lines, remaining in such plants night and day until the Governor of Ohio issued a proclamation, sent the National Guard into the strike area, and the plants opened under military supervision, on or about June 25 to July 1, 1937.

The complaint in this case was filed during the strike on July 16, 1937.

PROCEDURAL FACTS.

An original and two supplementary charges (R. I, 1, 7, 10) were filed with the Board by SWOC. It is alleged therein that petitioner engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (3) of the Act.

The complaint (R. I, 13) alleges that, before the strike, petitioner discharged certain of its employees at various of its plants because they had assisted SWOC, and locked out its employees at one Canton and one Massillon plant, for the reason that they joined and assisted SWOC and for the purpose of intimidating them to discontinue membership therein, thus engaging in unfair labor practices within the meaning of Section 8(3) of the Act; that, by reason of petitioner's unfair labor practices so described, and because of its refusal to enter into a written agreement with SWOC, the employees of petitioner, on or about May 26, 1937, went out on strike; that petitioner engaged in unfair labor practices in that it discharged and failed to reinstate, after the strike, because of their union

activities, certain employees at its Warren and Youngstown plants; dominated and interfered with the formation and administration of certain labor organizations at its various plants; and committed certain other alleged unfair labor practices.

The answer of petitioner (R. I, 26) denies that the strike was caused by the acts alleged in the complaint, averring that it was called by SWOC without justification, and that there was no labor dispute between petitioner and its employees and no differences as to wages, hours or working conditions; denies the allegations of unfair labor practices by petitioner, and asks that the complaint be dismissed for various reasons.

The hearing was begun on July 21, 1937, before the Board itself, in Washington, and continued until September 27, 1937, before a trial examiner, in Ohio. No intermediate report was filed by the trial examiner. On April 8, 1938, more than six months after the hearings had been concluded, the Board, without any notice to petitioner, issued its final decision and order against petitioner (R. I, 59). Petitioner filed in the court below (No. 6764) its petition to review and set aside this order of the Board. The Board, apparently induced by the decision of this Court in *Morgan v. U. S.*, 304 U. S. 1, attempted to withdraw its original order for further proceedings, and a rule was issued by the court below (Buffington, Davis and Thompson, *JJ.*) requiring the Board to file with it its transcript of the proceedings before it. This Court in *In re N. L. R. B.*, 304 U. S. 486, permitted the Board to withdraw its order, and petitioner's original proceedings for review were dismissed by the court below. The proceedings in No. 6764 are in the record herein by stipulation (R. VIII, 6273) and printed in a separate volume filed herein.

On July 8, 1938, the Board issued a so-called proposed decision and order, which was substantially the same as that of April 8, 1938 (R. I, 323, 324), to which both peti-

tioner (R. I, 580) and SWOC (R. I, 780) filed exceptions and briefs in support thereof. The petitioner moved on August 6, 1938, that the record be reopened for further proceedings and that it be permitted to introduce additional evidence or, in the alternative, to have incorporated into and made a part of the record detailed offers to prove (R. I, 746). On August 11, 1938, an alleged hearing before the Board was held, at which petitioner and SWOC were represented by counsel, petitioner expressly preserving all of its objections and exceptions to the jurisdiction of the Board, as fully appears in the record (R. I, 782).

On October 18, 1938, the Board issued its decision and order (R. II, 833) now under consideration, substantially identical, except in several respects,* with its original final order and decision of April 8, 1938, and overruled petitioner's motion to reopen the record and for leave to adduce additional evidence (R. II, 1076), incorporating petitioner's offers in the record (R. II, 1085).

The Board's order requires petitioner to *cease and desist* from dominating or interfering with the formation or administration of any labor organization of its employees at the Ohio plants involved, or contributing financial or other support thereto; discouraging membership in SWOC and affiliated organizations; and interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

The order also *affirmatively* requires petitioner to offer, upon their application, with certain minor specifically enumerated exceptions, reinstatement to all of petitioner's

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* e.g. The complaint is dismissed by the Board as to Harry Rigby (R. II, 1109). The preferential list for reinstatement purposes is limited in application to plants located in Ohio, Pennsylvania and Michigan instead of *all* petitioner's plants (R. II, 1095, 1096). Payments received by employees on work relief projects are ordered deducted from back pay awards and paid over to governmental agencies supplying the funds for such projects (R. II, 1106-7-8).

employees at its plants in the Canton, Massillon, Youngstown, Warren, Niles and Cleveland districts, who went on strike on May 25, 1937, and thereafter, together with back pay from five days after failure to reinstate upon application if work is available, according to a method discussed in detail under the reasons for granting certiorari, *infra* page 51; to withdraw recognition from certain labor organizations which, the Board finds, were company dominated unions; to reinstate, with back pay, 26 former employees of petitioner specifically named in the complaint as having been discriminated against; to make whole the employees at petitioner's Canton tin plate and Massillon works mills for the losses of pay sustained by them by reason of alleged unlawful lock-outs at these plants before the strike.

By the Board's order, petitioner is required to pay to fiscal agencies for federal, state, county, municipal or other work relief projects, the amounts paid by them to former employees of petitioner for services actually performed by them on such relief projects, in the event they are not offered reinstatement as above provided and obtain employment from such work relief projects. This is the first case in which such a provision was included in any Board order, although the Board had previously issued hundreds of orders involving back pay. It was not even included in the Board's first order or second proposed order in the case at bar.*

Proceedings in the Circuit Court of Appeals. The court below, upon review, enforced the Board's order in its entirety, except that it excluded from the order of general reinstatement of strikers some, but by no means all, of petitioner's employees who, during and incident to the

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* Examination of Volumes I through IX of the Board's official reports (up to November 30, 1938) discloses that this provision had never been included in any order prior to that made in the case at bar.

strike, had been convicted of crimes but were, nevertheless ordered reinstated by the Board; and denied petitioner's petition for leave to adduce additional evidence (R. VIII, 6294).

EVIDENTIAL FACTS AND HOLDINGS OF COURT BELOW.

The cause of the strike. Sections 2(f) and 2(g) of the lower court's decree require petitioner to reinstate, upon application since October 18, 1938, the date of the Board's last order, and in the future, with back pay if the applications were or are refused, practically all of its striking employees (R. VIII, 6297, 6298). This portion of the order applies to a large group of strikers and may involve the payment by petitioner of a substantial sum of money.

The Board and the court below both held that these sections of the order can be sustained and these strikers legally reinstated only if it is established by the evidence that the strike was caused by petitioner's unfair labor practices (R. II, 1083; VIII, 6286), and both held, also, that the immediate cause of the strike was, in part at least, the refusal of petitioner to sign a standard form of collective bargaining contract submitted to it for signature by SWOC (R. II, 1074; VIII, 6287).

The petitioner's position is that there is no evidence that petitioner's alleged unfair labor practices caused the strike, but that such evidence as bears on this point discloses that petitioner's refusal to sign a contract, which, as the Board (R. II, 1074) and the court below (R. VIII, 6286) conceded, it was not required by law to sign, was not only the immediate and precipitating cause of the strike, but the sole cause thereof.

The Board found, in its first decision (R. I, 292), second *proposed* decision (R. I, 560), and third decision reviewed by the court below (R. II, 1071, 1072) that, while petitioner's refusal to sign a contract was not, of itself, an unfair labor practice, and was, in part, the immediate

cause of the strike, nevertheless the "fundamental cause of the strike and a substantial factor in its precipitation" was petitioner's "campaign to crush the union" by means of its unfair labor practices.

After petitioner was afforded, for the first time, an opportunity to argue this issue, *inter alia*, to the Board upon its exceptions to the proposed decision and order, the Board found, in addition, and for the first time (R. II, 1074, 1083), that the form of contract was presented to petitioner by SWOC for the purpose of making it unnecessary to strike on account of petitioner's unfair labor practices, due to the fact that it contained (standard) provisions against such practices by the employer, and that petitioner claimed that SWOC made no complaint as to hours or wages of petitioner's employees.

The court below held that SWOC sought the signing of the contract presented, "not to raise wages or improve working conditions, for it purported to do neither (although the contract dealt specifically therewith), but solely to put an end to the warfare between the union and Republic," which had resulted from the latter's unfair labor practices; that the clauses of the contract against such practices demonstrated that SWOC sought "a formal declaration by Republic that it would not continue these practices but would recognize and not interfere with the right of its employees to become members of the union"; that "the latter's refusal to sign was but one more indication that it proposed to continue those practices"; that it could not say that petitioner's refusal to sign the contract was the cause of the strike, "even though doubtless its execution would have averted it," and upheld, as being sustained by the evidence, the Board's finding that petitioner's alleged unfair labor practices caused the strike (R. VIII, 6287).

The only direct evidence introduced by the Board as to the cause of the strike, although offered for an entirely

different purpose, i.e. as disclosing petitioner's unfriendly attitude towards SWOC, is a written statement by petitioner issued about two weeks before the strike (Board's Ex. 97, of. R. IV, 2818, pr. R. VII, 5715*), wherein, in describing negotiations between it and SWOC, it, among other things, said: "The CIO made no complaint relative to wages or hours of Republic employees. *In spite of this, the union demanded that the company sign their contract. This is the only matter at issue,* and the company at its May 11th, 1937 meeting informed the CIO representatives that it still believed it inadvisable to sign such a contract."

The Board introduced no evidence (and none appears in the record) as to any strike vote at any of petitioner's plants, nor of any action at meetings of SWOC or its officers, or instructions by them to the local unions as to calling the strike, disclosing its cause or purpose, although SWOC filed the charges upon which the complaint was based.

The petitioner, at the hearing, offered in evidence, *over the objection of counsel for the Board,* the proposed collective bargaining contract itself, the letter from SWOC to petitioner enclosing it, and the telegraphic correspondence concerning it between petitioner and SWOC (R. VII, 5131), all of which were admitted in evidence. This disclosed that on March 30, 1937, SWOC forwarded a form of contract (Pet. Ex. 63, of. R. VII, 5132; pr. R. VIII, 6151) to petitioner, accompanied by a letter suggesting a conference (Pet. Ex. 62, of. R. VII, 5132; pr. R. VIII, 6149); that on May 3, 1937, SWOC wired petitioner demanding a "conference to negotiate written contract" (Pet. Ex. 59, of. R. VII, 5131; pr. R. VIII, 6146); that on May 5, 1937, petitioner replied that "in view of Wagner Act see no necessity for signed contract" but would meet SWOC "at any time mutually convenient for collective bargaining purposes"

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* For brevity, "offered in the record" and "printed in the record" are designated "of." and "pr." throughout.

(Pet. Ex. 60, of R. VII, 5131; pr. R. VIII, 6147); that SWOC replied on May 6, 1937, stating that if petitioner proposed that the parties "commit provisions verbally agreed upon to memory" the proposed conference was a "futile waste of time" (Pet. Ex. 61, of. R. VII, 5131; pr. R. VIII, 6148). As the Board found (R. II, 875, 880) one conference was held on May 11, 1937, at which negotiations broke down. The only evidence as to what took place at this conference is Board's Exhibit 97, *supra*. The contract submitted was described by SWOC to petitioner as its "standard form of collective bargaining contract" (Pet. Ex. 59), "identical" in its "principal features" with those signed by "Carnegie Illinois Steel Corporation and other United States Steel Corporation subsidiaries" (Pet. Ex. 62) on March 17, 1937 (R. II, 868), (thirteen days before submission thereof to petitioner, and described by the Board as "an event of historic importance in the steel industry" (R. II, 868)), and "approximately one hundred other companies" (Pet. Ex. 61). There is no reference or intimation whatsoever in the contract or correspondence to petitioner's alleged unfair labor practices.

The record affirmatively discloses that the strike at petitioner's plants was a part of a general strike against "little steel," including petitioner, Bethlehem Steel Corporation, Youngstown Sheet & Tube Company and Inland Steel Company (Board's Ex. 99; of. R. IV, 2818, pr. R. VII, 5723, 5728, 5749), supporting the inference arising from the proximity of the dates of signing by "big steel" and submission of the contract to "little steel," that refusal to sign the contract was the sole cause of the strike.

The "campaign to crush the union," the basis of the Board's finding on this phase of the case, was found by the Board to consist of the following: (1) Every unfair labor practice which the Board found petitioner had committed from the time it issued its statement of policy in July, 1936 (Board's Ex. 104, of. R. IV, 2854; pr. R. VII, 5776) up

to May 3, 1937, when SWOC opened negotiations (R. II, 1071, 1072), specifically, (a) shadowing of union organizers, (b) attacks upon organizers by petitioner's police, (c) threatening, (d) laying off and discharge, of employees for union activities, (e) fostering of a series of puppet labor organizations, and (f) vilification of the union by petitioner's chairman and president; (2) "The manner and expression" of petitioner's "*refusal to deal* with the SWOC" (a) by issuing its statement of policy in July, 1936, *supra*, (which declared for the "open shop" principle, but did not refer to collective bargaining with SWOC); (b) statements by foremen and minor superintendents that petitioner would not sign any contract with CIO (Cf. *N. L. R. B. v. Sands Manufacturing Company, infra*); and (c) petitioner's statement that it saw no necessity for a signed contract (although it offered to bargain collectively); and (3) alleged lockouts at its Canton Tin Plate Mill and Massillon Works (although both of these mills resumed operations at least two days before the strike commenced, see *infra*, pages 22, 23), and attempts to obtain membership for alleged puppet unions after the breakdown of negotiations with SWOC on May 11, 1937.

Obviously, extended discussion of this "campaign" is impossible. The statement of the facts as to subdivisions (2) and (3) sufficiently indicates, we believe, their apparent lack of importance in causing the strike. As to subdivision (1), the record discloses (a) testimony as to the shadowing of two union organizers in the Canton and Massillon district identified only by their hearsay admissions to a deputy sheriff as petitioner's company police (R. II, 1592), one organizer at Youngstown who was not bothered thereby (R. III, 2049) and certain employees and organizers at Cleveland; (b) testimony as to three incidents at Cleveland, in the first of which an organizer was hit by an unidentified man seen two weeks later in company police uniform (R. IV, 2548-51, 2570), in the second of which a union organizer

and an unidentified employee engaged in a fight stopped by a company policeman (R. IV, 2550, 2580), and in the third of which an organizer was beaten by a man identified as a company policeman at a place off petitioner's premises where the witness could not see into the plant, more than a month before the strike (R. IV, 2594-2597); (c) testimony as to sporadic statements made to individual employees by minor supervisory employees (R. III, 1789), (III, 1938), (III, 1911), (III, 1916), (III, 1712-1714), (III, 1687), (III, 1791-1793), (III, 2198), (III, 2209), (III, 2185), (III, 2173-2175), (III, 2416-2426), (IV, 2728), (IV, 2662), examination of which shows that, according to the Board's witnesses, most were made in the course of warnings against union organization *on company time and property,* and as to speeches at safety meetings (R. II, 871), (III, 1740), (III, 1763), (III, 1790), (III, 2170; 2187), (III, 2091), (III, 2095; VI, 4754, 4757), (III, 2255-58), (III, 2210-2212); (d) testimony showing discharge or layoff of 18 men (out of 40,172 employed in petitioner's Ohio plants (II, 843)), 7 of whom were found by the Board to have been discharged or laid off in 1936 (II, 983; 1043; 1044; 1045; 1046; 1049; 1051), 4 in January 1937 (II, 1056; 1058; 1059; 1060), 2 in February 1937 (R. II, 996; 1062), 2 in March 1937 (R. II, 1012), 2 in April, 1937 (II, 1001; 1003), and 1 on May 3, 1937 (R. II, 859) over a month before the strike commenced, and of whom 9 of the only 11 whose discharges were alleged by SWOC in the charges as causes of the strike (R. I, 2) were found by the Board to have been reemployed prior to the commencement of the strike (II, 1044; 1045; 1046; 1050; 1057; 1059; 1060; 1061; 1062) and 1 offered reemployment prior thereto (R. II, 1052); (e) testimony and other evidence as to employee representation plans, inaugurated at petitioner's plants in 1933, and independent unions found by the Board to have been fostered and dominated by petitioner; (f) evidence of alleged "vilification" of SWOC consisting only of petitioner's statement

of policy of July 2, 1936 (Board's Ex. 104, *supra*), and petitioner's statement to its employees of May 11, 1937 with regard to negotiations with SWOC (Board's Ex. 97, *supra*).

Violence and lawless conduct during the strike by pickets, strikers, etc. The uncontroverted evidence discloses that, *at Massillon* on the night this strike commenced, the entrances to the Massillon works were blocked by cars and one gate wired completely shut (R. IV, 3063-3065); the plant was surrounded by pickets carrying clubs, iron pipes and ball bats (R. IV, 3067; V, 3599); that the next morning, a bus was prevented from discharging employees in the plant (R. IV, 3067); mail trucks were prevented by strikers from entering the Massillon plants (R. II, 1250, 1263); employees were prevented from entering the mill after the start of the strike (R. IV, 3133, 3140) and from entering the main office (R. IV, 3054, 3060, 3100, 3147); telephone wires into the main office of the Massillon works were cut by strikers (R. IV, 3072) who refused to allow petitioner's telephone line to be repaired (R. IV, 3118-3122). The Board found (II, 887, 901) that, according to the city officials at Massillon a controversy lasting several weeks occurred between them and a committee of citizens as to whether or not special police should be appointed, since the city officials felt that special police should not be used to "break the picket lines" and reopen petitioner's plants so that men who desired so to do could return to work. When the men who were besieged in the plant were finally taken out, they were escorted by the Chief of Police to the CIO headquarters (R. II, 1219; R. IV, 3076-3078, 3095), pickets beat up employees (R. II, 1249, 1250); a foreman was kidnapped and searched (R. IV, 3087). *At Canton,* petitioner's plants were completely surrounded by strikers carrying clubs, iron pipes, ball bats or rods on the first night of the strike (R. V, 3608-3611), and this situation continued (R. V, 3611-3614) until

an injunction was issued by the state Common Pleas Court (R. V, 3615); employees were prevented from entering the plant on the first day of the strike (R. V, 3766) and those inside the plant did not attempt to leave on account of the "violent picketing" (R. V, 4113), but worked and slept in the plant from May 25 to July 1, as found by the Board (R. II, 992); pamphlets, bearing the union label (Pet. Ex. 18, of. V, 4147, pr. VIII, 6006), were dropped by an airplane inside one of the plants urging the besieged workmen to leave the plant, stating that their safety in leaving the plant would be guaranteed for the next twelve hours, *that after that time their safety would be their own responsibility* (R. V, 4146). Clubs and other weapons taken from the pickets following the granting of the injunction are pictured in Petitioner's Exhibit 8 (R. VIII, 5928½). Employees suspected of participating in a back-to-work movement were kidnapped and terrifically beaten by strikers (R. V, 3937-3943; 3767-3769; 3789-3795; 3796; 3825-3833; 3860-3865; 3868-3872; 3908-3911; 3889-3896; 3769-3776).

Upon exclusion of evidence by the trial examiner,* petitioner presented extensive and detailed offers to prove, which were made a part of the record by the Board, and were considered by the court below as being actually in evidence before it (R. VIII, 6289) relating to violence and lawless conduct by strikers, pickets, etc. in the *Youngstown, Warren, Niles* district (Pet. Ex. 50, of. R. VII, 5082; pr. R. VIII, 6072), and in the *Cleveland* district (Pet. Ex. 64, of. R. VII, 5134; pr. R. VIII, 6157) respectively, similar to, and even worse than, that at Massillon and Canton, described *supra*. The Board's findings (R. II, 897) as well as the record, disclose that various plants of petitioner were not opened for free ingress and egress, due to the strikers'

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* Because the Board's counsel had ceased introducing evidence to show that SWOC picketing was "peaceful" after the hearings as to the Canton-Massillon area.

conduct, until the Ohio National Guard was sent into the strike area pursuant to a proclamation of the Governor of Ohio (Pet. Ex. 65, of. R. VIII, 6226; pr. R. VIII, 6227) and order to the Adjutant General of Ohio (Pet. Ex. 66, of. R. VIII, 6226; pr. R. VIII, 6228).

Petitioner urged in the court below that the strikers should not be reinstated generally and indiscriminately because of this general and indiscriminate, violent and unlawful conduct, and also because the record establishes that the strike was illegal in its inception and conduct, its purpose being to prevent petitioner from continuing its business operations until it complied with the strikers' demands and that each striker who was a factor in the combination and conspiracy was responsible for the unlawful acts committed by all other strikers engaged therein. The court below held that it could not consider this proposition because of the provisions of Section 6 of the Norris-LaGuardia "anti-injunction" Act (29 U. S. C. A., Sec. 106) which prohibits United States courts from holding members of a union participating in a labor dispute responsible "for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or ratification of such acts after actual knowledge thereof," the court indicating that this Act applied to this case although this was a special proceeding for the enforcement of the Board's order (R. VIII, 6288).

The court below (R. VIII, 6290) sustained the action of the Board (R. II, 1085) in considering only evidence of *conviction* of individual strikers of "sufficiently serious" *crimes*.

Crimes committed by strikers. The Board in its decision and order (R. II, 1087) finds:

> "An analysis of the convictions and pleas of guilty in all of the respondent's offers to prove, of which we take judicial notice, supplemented by an examination of the criminal dockets of the Municipal Courts of

Massillon, Canton, Niles, and Cleveland, the Courts of Common Pleas of Trumbull, Mahoning, Stark, and Cuyahoga Counties, and the United States District Court for the Northern District of Ohio, Eastern Division, at Cleveland, shows that in Youngstown seven 'members or former members of the C.I.O.' were indicted for the 'possession and use of explosives,' a felony; that three pleaded guilty to the indictment and received sentences of 1 to 20 years in the Ohio penitentiary; that three others who pleaded guilty to the indictment were placed on probation for 5 years; and that one pleaded guilty to 'malicious destruction of property to the value of $300,' a felony, and was fined $300 and costs. It also appears that in Cleveland four 'strikers, pickets, and persons affiliated with the S.W.O.C. and the C.I.O.' were found guilty of 'possession of a bomb,' a felony, and received sentences of 1 to 20 years in the Ohio penitentiary. It further appears that nine 'members of lodges or unions affiliated with the C.I.O. and the S.W.O.C.' pleaded guilty to indictments for 'unlawfully obstructing and retarding the passage of the United States Mail,' a misdemeanor; that six received suspended sentences of 6 months in jail and were placed on probation; that two received sentences of 30 days in jail and costs; and that one received three sentences, to run concurrently, of 60 days in jail and costs. It further appears that 144 'strikers, pickets, individuals, members of, or persons affiliated with, lodges or unions affiliated with the C.I.O. and the S.W.O.C.' entered pleas of guilty to, or were found guilty of, the following offenses:

"Intoxication (a misdemeanor)	1
Intoxication and violation of court order (a misdemeanor)	1
Threatening in a menacing manner (a misdemeanor)	1
Suspicious person (a misdemeanor)	4
Disturbing the peace (a misdemeanor)	4
Disorderly conduct (a misdemeanor)	7
Interference with a police officer (a misdemeanor)	3
Discharging firearms (a misdemeanor)	3

Assault and battery (a misdemeanor)	21
Rioting, assembling together to do an unlawful act (a misdemeanor)	72
Malicious destruction of property (a misdemeanor)	7
Unlawfully interfering etc. with telegraph or telephonic messages (a misdemeanor)	1
Transporting explosives (a misdemeanor)	1
Interfering with and obstructing railway tracks (a felony)	5
Carrying concealed weapons (a felony)	13''

Petitioner's offer to prove additional facts after the hearing (R. I, 47) filed pursuant to the Board's order (R. I, 45) discloses that SWOC paid fines of members of SWOC and CIO convicted of crimes in the Youngstown district totalling $4,711.32 (R. I, 54).

The Board, by its order, required petitioner, ''to effectuate the policies of the Act,'' to reinstate all of the employee members of this group who had committed the crimes specified, with the exception of six who pleaded guilty to the possession and use of explosives, one who pleaded guilty to the malicious destruction of property to the value of $300, and four who were found guilty of possession of a bomb (R. II, 1090). The court below added to this list such Republic employees as were included among

> ''nine persons convicted of unlawfully obstructing and retarding the passage of United States mail, three of discharging firearms, seven of malicious destruction of property to the value of less than $300, one of unlawfully interfering with telegraph or telephone messages, one of transporting explosives, five of interfering with and obstructing railroad tracks, thirteen of carrying concealed weapons, and one of assault and battery 'sufficiently serious' to call for the imposition of a fine of $200 and costs and a suspended sentence of six months'' (R. VIII, 6290, 6291).

The court, however, ordered reinstatement of all other striking Republic employees including twenty instances of conviction of assault and battery and seventy-two of riot.

Alleged Lockouts at the Canton Tin Plate Mill and Massillon Works.

The Canton tin plate mill, employing only 680 men (R. V, 4186), was closed from May 5th until May 24, 1937 (R. II, 987), and reopened two days prior to the strike. The former superintendent of this mill, who was not employed by petitioner at the time he testified (R. V, 4178), testified, without dispute, upon the basis of schedules covering production commencing Monday of each week (R. V, 4185) that no production was scheduled for the weeks commencing May 10th and May 17, 1937, because of a strike at the Canton Stamping & Enameling Company, the largest customer of the tin plate mill, on April 29, 1937, which resulted in that company's refusing delivery of tin plate equivalent to two weeks' production, and, therefore, the plant was shut down gradually when work in process was completed (R. V, 4182-4186).

The only evidence introduced by the Board was that of the vice president of the local SWOC lodge (R. III, 1711), who testified that he called Thomas (assistant superintendent of the tin plate mill (R. III, 1785, 1792)) to ascertain when the mill would resume operation, and that Thomas told him he did not think the mill would start up until they got rid of the union (R. III, 1717).

The Board held (R. II, 988) that petitioner failed to sustain the burden of proving facts in its sole possession that a decrease in orders caused the shut-down by showing the size of the orders of the Canton Stamping & Enameling Company, how long the strike lasted at that plant and the extent to which that strike caused the decrease in orders (although the Board's counsel did not cross examine petitioner's witness on this point). The Board found that the "ostensible business reason" advanced by petitioner's witness was "vitiated" by the statement supposed to have

been made by Superintendent Thomas to the vice president of the SWOC local, *supra.*

The Massillon Works plant was partly closed on May 20th and reopened on May 23, 1937 (R. II, 878), three days before the strike commenced.

Petitioner's combustion engineer testified, without contradiction, that the evening of May 20, 1937, it was found necessary to shut down certain units of the plant, because the main generator was in a dangerous condition, but that other departments were unaffected by the shut-down (R. VI, 4253, 4254); that there was a provision for switching from the generator unit to power furnished by the public utility *with a demand charge involved* (R. VI, 4259) and that it was *a matter of expense* to have used the power from the power company instead of shutting down the mill (R. VI, 4259, 4260); that the works were partly shut down while the generator was repaired and opened up again on May 23rd (R. VI, 4254).

The Board did not controvert this evidence, but introduced evidence that two minor superintendents and a foreman had told employees that recognition of the CIO would mean a shut-down of the plant, and the testimony of the president of the SWOC local (who was later indicted for obstructing the United States mails during the strike (R. II, 1313-1314)), that during the three day period of the shut-down his foreman told him that the men would not want to strike when petitioner got through starving them out (R. II, 879).

The Board gave no credence to the engineer's testimony because power from the power company could have been substituted (R. II, 879), but in so doing disregarded his uncontroverted testimony that this would have been a matter involving expense and found that the SWOC local president's testimony "reveals the respondent's motive for the shut-down" (R. II, 879).

The Board ordered petitioner to reimburse employees at these plants for loss of pay during the shut-downs (R. II, 1107). The court below affirmed the Board's findings (R. VIII, 6281) and enforced its order (R. VIII, 6296, 6297).

Union domination. The Board ordered petitioner to withdraw recognition for collective bargaining purposes from certain organizations of its employees which were in existence after the strike, namely, the Independent Association of Republic Employees at Massillon, the Steel Workers Union at Canton, the Independent Federation of Republic Employees at Youngstown, and the Employees Independent Association at Warren (R. II, 1105, 1106). The court below sustained this order (R. VIII, 6283). The trial examiner excluded evidence of approximately 2000 or more witnesses *that they joined the independent union at Massillon of their own free will, and that in so doing they were not influenced by anything said or done by petitioner, or any of its officers or agents* (R. VI, 4337; 4345-46; 4350; 4354-5), an offer of proof being made by petitioner to that effect (R. VI, 4358-4362; 4389-4394). The same ruling and offer to prove were made as to testimony of approximately 2500 witnesses proffered with regard to the independent union at Canton (R. VI, 4364; 4382; 4389; 4392), testimony of 1900 witnesses with regard to that at Youngstown (R. VI, 4726-27; R. VII, 5138), and testimony of approximately 1800 witnesses with regard to that at Warren and Niles (R. VI, 4734; R. VII, 5138). The Board denied petitioner's exceptions to the ruling of the trial examiner in this respect, as well as others (R. II, 838), and its action in this regard was affirmed by the court below.

Discrimination cases. The court below affirmed the Board's findings (R. VIII, 6283), and enforced its order (R. VIII, 6295, 6296) with regard to Sections 2(b) and (c) requiring petitioner to reinstate with back pay eighteen former alleged employees found to have been wrongfully

discharged or laid off for union activities before the strike, nine of whom had been reinstated before the strike, and eight employees who were refused reinstatement after the strike.

REASONS FOR GRANTING THE WRIT.

I.

The decision of the court below that the alleged unfair labor practices of petitioner caused the strike, and, therefore, justified the general reinstatement of substantially all striking employees with back pay "to effectuate the policies of the Act," (a) does not follow the applicable decisions of this Court requiring that the Board's order be supported by substantial evidence, N. L. R. B. v. Sands Manufacturing Co., 306 U. S. 332; N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292; (b) is in conflict with the decision of this Court in N. L. R. B. v. Sands Manufacturing Co., supra, and the decision of the Fifth Circuit Court of Appeals in Peninsular & Occidental S. S. Co. v. N. L. R. B., 98 Fed. (2d) 411, in that it depends for its support upon the alleged statements of minor supervisory employees with no authority to determine petitioner's labor policies; and (c) sanctions the application by the Board of its "background" technique for finding facts in a new way so opposed to the laws and rules of evidence that it should be supervised by this Court.

The facts, basis of the decision of the court below on this phase of the case, and its significance in relation to the decree, have been discussed *supra,* pages 11 *et seq.*

This Court may well take judicial notice of the notorious fact that CIO and its affiliate, SWOC, initiated a drive to organize the steel industry in 1936, and called a strike against "little steel" in the summer of 1937 because of the refusal of Bethlehem Steel Corporation, Inland Steel Company, Youngstown Sheet & Tube Company, and petitioner to sign written collective bargaining contracts with SWOC. In *In re Inland Steel Company,* 9 N. L. R. B. 783, originally

decided by the Board three days before this case, in which the evidence of negotiations substantially paralleled that in the case at bar, the Board recognized that the "great steel strikes of the summer of 1937, of which (Inland's) was a part" were caused by this controversy.* The Seventh Circuit Court of Appeals in *N. L. R. B. v. Inland Steel Company*, — Fed. (2d) —, found that the strike was called "to settle this admittedly legal question" (as to whether such a contract must be signed). Conversely, in the present case, the Board and the court below found that, while refusal to sign the contract presented (apparently identical with that presented to Inland) was one cause of the strike, a fundamental and second proximate cause was petitioner's "campaign to crush the union" and that, indeed, because of the specific provisions in the contract against unfair labor practices, and lack of any specific controversy as to wages, etc., the contract was presented to

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* The Board's finding in that case, pages 794, *et seq.*, shows that the course of the negotiations between Inland and SWOC was substantially similar to that in the case at bar. The Board found, page 796, that "Inland's refusal to enter into a signed agreement broke up the negotiations summarily. *On May 26, 1937,* the SWOC called a strike"; that thereafter *petitioner,* Youngstown Sheet & Tube Company, Inland Steel Company and Bethlehem Steel Company met with the Federal Steel Mediation Board and refused to "recede from the position that they would not enter into any agreement, written or oral, with the SWOC." The Board found (page 801) that *"The great steel strikes of the summer of 1937, of which the strike of the respondent's employees was a part, bear testimony to the fact that negotiation without willingness to enter a signed agreement under such circumstances is regarded by workers as an empty procedure"*; in other words, that these strikes resulted from the refusal of the companies involved to sign such contracts, which were sought because "unions justifiably feel that *full recognition* * * * cannot be obtained if they are denied the type of contractual relationships which characterizes ordinary business dealings." This is a clear finding that the steel strikes of 1937, including petitioner's, were called by SWOC to obtain "full recognition" by means of signed contracts. The original decision in the *Inland* case was issued on April 5, 1938 (page 785), three days *before* the original decision in the case at bar on April 8, 1939 (9 N. L. R. B. 219, 223).

make it unnecessary for SWOC to strike because of petitioner's prior unfair labor practices, if accepted by petitioner.

This remarkable disparity in the conclusions announced by the Board in these two cases as to the cause of the SWOC strike against "little steel" in the summer of 1937 alone emphasizes the importance of a review of this phase of this case by this Court.

However, in addition, the Board, in finding that the "campaign to crush the union" was the fundamental and a precipitating cause of the strike, applied its so-called "background" method, which was discussed and criticized by the court in *N. L. R. B. v. Union Pacific Stages, Inc.*, 99 Fed. (2d) 153, 158.

The Board's practice of finding facts showing hostility to unions as a "background," in the light of which, acts of employers relating to discharge of employees or to independent unions have been scrutinized and found unfair, has been sanctioned, *Agwilines, Inc. v. N. L. R. B.*, 87 F. (2d) 146, 151.* However, such evidence has been regarded as insufficient, in itself, to support findings of unfair labor practices in the absence of some direct and definite evidence. Cf. *Cupples Co. Mfgrs. v. N. L. R. B.*, 106 Fed. (2d) 100, 114; *N. L. R. B. v. Empire Furniture Corp.*, 107 Fed. (2d) 92.

Here, the Board predicated its finding upon an invalid inference based upon the "background" alone, and not upon direct and definite evidence as to the cause of the strike considered in the light of the background.

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* The "background" method followed by the Board probably had its inception in the statement of this Court in *Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 U. S. 547, 559, that "motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose." This is suggested in an interesting article in 7 *George Washington Law Review* 797, and corroborated by the reference to the Brotherhood case in *Agwilines, Inc. v. N. L. R. B., supra* at page 153. If so, the importance of supervision by this Court of the use of the "background" method obviously is of public importance.

The Board made specific findings as to the "Background of the strike; * * *" at Massillon, Ohio (R. II, 860) and concluded generally that the fundamental cause of the strike and a substantial factor in its precipitation "was the long series of unfair labor practices which occurred prior to the strike as set forth in Section III above" (R. II, 1075), entitled "The Unfair Labor Practices" (R. II, 845), which covers 226 pages of the record (R. II, 845-1071).*

Since there was no direct evidence as to the cause of the strike, such as testimony by union officials or minutes of union action, *the Board necessarily based its finding in this respect upon the hypothesis that, since there was a "campaign to crush the union," the strike must have resulted from it.* This is indicated by the Board's finding that the "campaign" underlay and *"made inevitable the strike"* and that "faced with this illegal and provocative conduct the union called the strike, * * * because in fact *no other course remained open to it"* (R. II, 1074). Clearly, there is no basis for this finding. For instance, an appeal to the Board to put an end to petitioner's alleged "campaign," another course open to SWOC, was no less inevitable, and more in consonance with public policy. *N. L. R. B. v. Fansteel Metallurgical Corporation, supra.* Therefore, assuming that the evidence was consistent with the Board's hypothesis that the "campaign" caused the strike, it was not inconsistent with the contrary hypothesis, and supported neither; *Gunning v. Cooley,* 281 U. S. 90, 94; *Stevens v. The White City,* 285 U. S. 195, 204; *Appalachian Electric Power Co. v. N. L. R. B.,* 93 Fed. (2d) 985, 989.

The Board thus used its "background" method in a new and clearly unwarranted manner.

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* 99 pages of III (R. II, 881-980) are devoted to a discussion of the so-called Massillon riot during the strike, which has no bearing on this phase of the case.

The Board and the court below indulged in further unwarranted speculation and conjecture when they held that the (standard) form of contract was presented to petitioner by SWOC merely for the purpose of making it unnecessary for SWOC to strike because of petitioner's unfair labor practices due to the fact that it contained a (standard) provision against such practices. In the absence of direct evidence, it was inferred that this *must* have been the purpose of presenting the contract because there was no dispute as to wages, hours or conditions of labor. This inference is based upon the unsupported assumption that no union will ever seek recognition by the signing of a written collective bargaining contract by the employer in the absence of a controversy as to wages, hours and conditions of labor or some specific reason other than "recognition" itself. This assumption is clearly opposed to the Board's own assertions.* If the premise of the Board and the court below is accepted, it must be assumed that SWOC was settling specific grievances as to wages, hours or conditions of work, or making it unnecessary for the union to call a strike on account of specific unfair labor practices, when it signed its standard form of "collective bargaining contract" with each of the one hundred companies to which it referred in its correspondence with petitioner.**

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* The Board, itself, stated in *In re St. Joseph Stockyards Company*, 2 N. L. R. B. 39, that "* * * the main objective of organized labor for long has been the collective agreement and the history of organization and collective bargaining may be written in terms of the constant striving for union recognition through agreement. In many cases employees have left their employment *and struck solely because of the employer's refusal to enter into a collective agreement.*" In *In re Inland Steel Company, supra,* as previously seen, the Board recognized that the strikes against "little steel" in 1937 were for "full recognition" by means of signed written collective bargaining contracts.

** This assumption is disproved by the Board's own finding in *Matter of Inland Steel Company, supra,* that when SWOC presented the same form of contract to Inland Steel Co. that company stated

(Continued on page 30)

We trust that, in view of the substitution by the Board of speculation and conjecture for evidence which it was within its power to produce from SWOC, the charging party herein, if it existed, this Court will exercise its discretion to grant certiorari in this case, not only for the purpose of restricting the Board to a proper method of procedure in deciding an oft recurring question of great practical importance, but also in order to remedy an obviously erroneous decision herein.

The record demonstrates that, in the absence of direct evidence by SWOC as to why the strike was called, the only valid inference from the evidence in the record is that the sole cause of the strike was petitioner's refusal to sign the contract.

The discussion of the facts as to the negotiations between SWOC and petitioner, *supra*, pages 13 *et seq.*, discloses that SWOC, inspired by its success in obtaining "full recognition" from the United States Steel Corporation, presented its identical form of written collective bargaining contract to petitioner, unaccompanied by any complaints or ultimatums with regard to any prior "campaign" of petitioner to crush SWOC by unfair labor practices or mention of specific provisions against unfair labor practices contained in the contract, and stated that further negotiations were useless if petitioner refused to embody any agreement reached in a signed contract. This is the only evidence of any demand made upon petitioner by

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(Continued from page 29)

that it "saw no reason for signing an agreement, alleging that the respondent's wages and hours were already equal to those in effect at Carnegie-Illinois" (p. 795), that "there was little discussion of the terms" thereof, and that Inland's "refusal to enter into a signed agreement broke up the negotiations summarily" (p. 796), (indicating no effort by SWOC to settle specific controversies as to wages, hours, etc.); and its failure to find that the contract was presented for the purpose of making it unnecessary for SWOC to strike on account of specific unfair labor practices committed by Inland.

SWOC prior to the strike, refusal of which might result in a strike.

The only reference in this whole correspondence to anything other than a signed collective bargaining contract was SWOC's statement in its first telegram dated *May 3, 1937* requesting a conference (Petitioner's Exhibit 59) that "widespread unrest employees your company various mills prevails over uncertainty your position regarding signed collective bargaining contract Stop *This unrest accentuated result layoff several hundred union members your Canton and Massillon Works.*" This telegram, sent on May 3rd, 1937, as the Board found (R. II, 873) could not have referred to the subsequent shutdowns of the Canton Tin Plate Mill and Massillon Works, found by the Board to have occurred on May 5th, 1937 (R. II, 987) and May 20th, 1937 (R. II, 878). Yet the charges filed by SWOC, alleging certain discharges as causes of the strike (R. I, 2), referred in this connection to no one from Canton, and to only one man at Massillon, Mayer, charged to have been discharged on May 25, 1937, long after this telegram was sent. These facts lead to the necessary conclusion that this makeweight was pure fiction and could not have indicated another cause of the strike.

In view of the foregoing state of the record, and the Board's concession that refusal to sign the contract was not an unfair labor practice, the Board necessarily based Sections 2 (f) and (g) on its finding that petitioner's "campaign to crush the union" was the underlying and a precipitating cause of the strike. The discussion of the facts as to this "campaign," *supra,* pages 15 *et seq.,* shows, we believe, without further comment that, even if these alleged unfair labor practices took place, they preceded so far in time the date of the strike and were so sporadic in nature that it is impossible to believe that they could have constituted, without any attempt by the union at adjustment, a substantial cause for calling a general strike, the purpose

of which was to close down numerous plants of petitioner in which over 40,000 men were employed.

The admission against interest by SWOC in the charges herein that, aside from the contract, the strike was caused by discharges of certain individuals and the shutdown of the Canton Tin Plate Mill (R. I, 2) seems a complete answer to the proposition that the "campaign" was the fundamental cause of the strike. Of the men referred to in these charges, only eleven at Cleveland were found to have been discriminatorily discharged, and of these, nine were found by the Board to have been reemployed, and one offered reemployment, prior to the commencement of the strike, *supra,* page 16. Layoffs of men at Cleveland were not mentioned, of course, in the only reference to layoffs made by SWOC in its negotiations with petitioner, *supra,* page 31. The Canton mill, of course, opened two days before the strike commenced. The incompetent basis of the Board's finding as to this shutdown is discussed *infra.*

In addition the following facts appear in the record without dispute; the complaint herein (R. I, 13, 17), signed by two members of the Board (R. I, 24), contained no reference to the alleged "campaign," the unfair labor practices therein alleged being confined to the alleged discriminatory discharge of certain employees before the strike and alleged lock-outs at two of petitioner's plants (which were reopened before the strike commenced, see *supra,* pages 22, 23); when, at the hearing, petitioner offered in evidence the contract presented to it by SWOC and the correspondence concerning it bearing upon the cause of the strike, counsel for the Board objected thereto upon the ground that they were incompetent, irrelevant and immaterial; there was no finding by the Board that the contract was presented to petitioner so as to obtain from it a declaration that it would put an end to its alleged unfair labor practices in the Board's first final and second proposed

decisions, such finding appearing for the first time in the Board's third decision, now under review, after petitioner had attacked the Board's previous finding as to the cause of the strike; the Board offered no direct evidence as to the cause of the strike save a written statement by petitioner issued after its sole conference with SWOC, about two weeks before the strike, declaring in substance that the only matter at issue was petitioner's refusal to sign a contract, *supra,* page 12; the strike against petitioner was a part of a general strike against all of "little steel," including Bethlehem Steel Corporation, Youngstown Sheet & Tube Co., and Inland Steel Co.; there is no reference in the correspondence incident to the presentation of the contract by SWOC to petitioner, or otherwise in the evidence, disclosing or intimating that the union's purpose in having petitioner sign the contract had any reference to the provisions therein contained against commission by petitioner of acts constituting unfair labor practices; on the contrary, SWOC admitted against interest in the charges that, aside from certain discharges and the alleged lock-out at the Canton mill, the strike involved "the demand for *a* written contract" because petitioner "refused to enter into *any* written agreement" with SWOC (R. I, 3).

There is thus created a situation in which there is not only no direct evidence supporting the Board's finding, sustained by the court below, that the strike was caused by petitioner's campaign to crush the union, but all of the evidence supports the conclusion that the sole and proximate cause of the strike was petitioner's refusal to sign a contract, something which it was not compelled by law to do, and which, as both the Board and the court below found, did not constitute an unfair labor practice.

The Board's finding (R. II, 1073, 1074) approved by the court below (R. VIII, 6281), that the strike was precipitated, in large part, by unfair labor practices consisting of an alleged lockout at Canton, accompanied by a "threat"

(of the assistant superintendent of this comparatively small mill, *supra,* page 22), that it would not resume operation until "we get rid of the union," and by an alleged lockout at Massillon, accompanied by a "taunt" (of a foreman, *supra,* page 23), that the men would not strike after they were "starved out," is directly in conflict with the decision of this Court in *N. L. R. B. v. Sands Manufacturing Co., supra,* in which this Court held that a superintendent or foreman does not hold "such a position that his statements are evidence of the company's policy."

The decision of the court below conflicts with that of the Fifth Circuit Court of Appeals in *Peninsular & Occidental S. S. Co. v. N. L. R. B.,* 98 Fed. (2d) 411, in which the Board's finding that seamen had been discharged because they had assisted the union "rested mainly on acts and statements attributed to certain inferior ship's officers which indicated opposition" (page 416) to the union. The court, in reversing the Board's order for lack of substantial evidence, said, page 413:

> "There was no evidence at all to show that the officers of the company, *who alone had authority to discharge the crews,* had participated in or ratified said actions of the ship's officers."

The conflict is particularly apparent since in this case SWOC had commenced negotiations on May 3, 1937 with the policy-making officials of petitioner prior to these shutdowns. In the *Peninsular* case Sibley, *J.,* concurring, said page 416:

> "It clearly appears that the decision to discharge all the crews and tie up the ships was made by the Company's officials, as was the decision to reemploy crews and sail them again. *The motives and intentions of the officials who made these decisions are to be attributed to the Company, and not those of ship's officers who had nothing to do with the decisions.*"

It does not appear herein which officials ordered the shutdowns, but it is obvious that an assistant superintendent

of the Canton mill and a foreman in the Massillon Works could not have participated in these decisions.

II.

The decision of the court below as to the legal effect and significance of violence by individual strikers, some of them convicted of crimes, and holding that Congress, when it enacted Section 13 of the Act, 29 U. S. C. A., Section 163, preserving the right to strike, intended to sanction violence by strikers in a labor dispute, and contemplated that the commission of crimes and the use of violence in furtherance of a strike by strikers should not deprive them of the possibility of reinstatement, is in conflict with the decision of this Court in N. L. R. B. v. Fansteel Metallurgical Corporation, 306 U. S. 240, and in conflict with the decision of the First Circuit Court of Appeals in N. L. R. B. v. Bradford Dyeing Association, 106 Fed. (2d) 119.

The court below, as pointed out *supra*, page 21, excluded from reinstatement of striking employees required by Section 2 (f) of the order, in addition to those excluded by the Board, such Republic employees as were included within nine persons convicted of obstructing the United States mail, three of discharging firearms, seven of malicious destruction of property valued at less than $300, one of transporting explosives, five of interfering with or obstructing railroad tracks, thirteen of carrying concealed weapons, and one of assault and battery "sufficiently serious" to call for the imposition of a fine of $200 and a suspended sentence of six months; and the court below upheld the action of the Board in limiting its consideration in the respect above stated to strikers actually convicted of crimes. The court below approved the reinstatement of all other employee members of this group, including twenty cases of assault and battery and seventy-two cases of rioting and unlawful assembling (R. VIII, 6290, 6291).

An examination of the decision of the court below discloses that, in dealing with the subject of acts of violence and law violation committed by strikers who were identified and actually convicted of crimes committed during and in furtherance of the strike, the court held (R. VIII, 6288-6291): (a) "Congress when it provided in Sec. 13 of the Act that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike" must have contemplated that striking employees might engage in *some acts of violence* and commit *some violations of law* during and in furtherance of the strike and still be eligible to "the possibility of reinstatement"; (b) striking employees may indulge in some degree of physical combat, strike "blows on the picket line" and commit "minor disorders" and still be eligible for reinstatement; (c) the right to strike, as protected by Section 13 of the Act, "would be indeed illusory" if strikers were deprived of the possibility of reinstatement by reason of their having indulged in violence and committed law violations of the character hereinbefore described and disclosed by the record herein; (d) the decision of this Court in the *Fansteel* case, *supra,* impliedly, at least, supports the action of the Board in reinstating with back pay striking employees actually convicted of crimes, including, among others, 20 strikers who pleaded guilty to assault and battery, and 72 who pleaded guilty to rioting and unlawful assembling; (e) the Board properly confined itself to evidence of actual "convictions in the criminal courts" in determining which, if any, strikers should be excluded from the operation of its order of general and indiscriminate reinstatement of strikers.

The holding by the court below that Congress, when it enacted Section 13 of the Act, contemplated that strikers might engage in some acts of violence and commit some violations of law and still be eligible for reinstatement, is, we submit, in direct conflict with the decision of this Court

in the *Fansteel* case, *supra*; wherein this Court said, *inter alia*, page 255:

"We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. *National Labor Relations Bd. v. Jones & L. Steel Corp., supra.* To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. *Associated Press v. National Labor Relations Bd.*, 301 U. S. 103, *supra. The conduct thus protected is lawful conduct.* Congress also recognized the right to strike,—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act 'shall be construed so as to interfere with or impede or diminish in any way the right to strike.' But this recognition of 'the right to strike' plainly *contemplates a lawful strike,*—the exercise of the right to quit work.

* * * * *

Page 257:

"We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. *There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.* On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. Elections may be ordered to decide what representatives are desired by the majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is au-

thorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, *not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct.* We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."

We do not believe that this Court intended by its decision in the *Fansteel* case to sanction violence or law violation by strikers committed in furtherance of the strike or as a means of enforcing their demands, nor to sanction, directly or impliedly, some acts of law violation while condemning others. We believe that when this Court said that "recognition of 'the right to strike' plainly contemplates a lawful strike," it did not intend to extend the protection of the Act to a strike characterized, as is that in the case at bar, by acts of assault and battery and rioting actually resulting in convictions of crimes. The court below clearly indicates that "blows on the picket line" and "minor disorders of this nature" should not deprive the striker of the possibility of reinstatement. What kind and character of "blows"? A blow may be a mere aggravated slap, or it may be such a vicious application of physical force as to fell a strong man. Where shall the line be drawn between the blow permissible and the blow prohibited? If certain acts of violence and law violation are, to use the language of the court below, "sufficiently serious" to bar the possibility of reinstatement, while other acts are "sufficiently minor" not to have that effect, again, where shall the line be drawn in this respect? The court below, on this phase of the case, had before it 21 convictions of assault and battery by strikers, pickets, members of SWOC, etc.; it approved the reinstatement in 20 cases and barred reinstatement in one case, "sufficiently serious to call for

the imposition of a fine of $200 and costs and a suspended sentence of 6 months"; but is this a safe and practicable method of dealing with this question?

If the decision of the court below on this phase of the case is allowed to stand, will it mean that strikers on the picket line may, with impunity, govern their acts and conduct upon the basis that they may commit some acts of violence and of law violation, engage to some extent in assault and battery and rioting, in the belief that by so doing they will not necessarily be deprived of the possibility of reinstatement?

We respectfully submit that such a doctrine is not only opposed to the law as announced by this Court in the *Fansteel* case and to the law generally governing the conduct of strikers and pickets, but is one which, if not corrected, may lead to consequences, the dangers of which it is difficult to foretell.

It is true that, in the *Fansteel* case, it appeared that the employer discharged the sit-down strikers, while, in the case at bar, it does not appear that any of the strikers were expressly discharged by petitioner. However, the decision of the court in that case was not predicated solely upon the basis that the striking employees were not entitled to reinstatement because they had been properly discharged by their employer, but rested, also, upon the broader ground that, in any event, it would not effectuate the policies of the Act to reinstate employees who had engaged in a sit-down strike, and that such an order was not within the discretion of the Board, it appearing that some of the strikers who had refused reinstatement had theretofore been discharged, while other strikers, who were likewise denied reinstatement, had never been discharged and had participated in the sit-down phase of the strike only to the extent that they aided and abetted the actual "sit-downers" by soliciting, procuring and delivering supplies to them.

The action of the court below in upholding the Board in confining its consideration of this phase of the case to strikers actually convicted of crimes is also in conflict with this Court's decision in the *Fansteel* case, wherein it excluded from the right to reinstatement strikers who had not been convicted of crimes although "most of them were eventually fined and given jail sentences for violating the injunction" which the employer had obtained from the state court requiring the men to surrender the premises.

The Board, in making an order of general and indiscriminate reinstatement of strikers without, at least, considering and weighing the evidence offered by petitioner, discussed *supra,* page 17, that these strikers had, generally and collectively, committed violent and unlawful acts of such a character as to make it obvious that their wholesale and blanket reinstatement would not effectuate the policies of the act, and the court below in affirming and enforcing this order, decided the case contrary, not only to the decision of the majority of this Court in the *Fansteel* case, *supra,* but also to the dissenting opinion of Mr. Justice Reed, which requires the Board to weigh the conduct of the parties, necessarily involving consideration of evidence of this nature as bearing on the conduct of the strikers.

The only legal and justifiable basis for this order of general reinstatement of strikers with back pay is that it will effectuate the policies of the Act. Will it have that effect? Will it tend to prevent strikes and labor disputes, or will it defeat and thwart the policies of the Act to require petitioner, the employer, to reinstate this large group of strikers, who, in furtherance of the strike and in an attempt to compel petitioner to sign a contract which, it is unanimously conceded, it was not required by law to sign, committed the acts of violence and law violation disclosed by the record? This Court held to the contrary in the *Fansteel* case, and the decision of the court below in this

case is clearly in conflict, in view of the uncontroverted evidence in the record as to the nature of the violent and unlawful conduct here involved, which even under the theory of the court below, was not limited to "blows on the picket line" and acts of "minor violence."

In *N. L. R. B. v. Bradford Dyeing Association, supra,* the First Circuit Court of Appeals held, with regard to two employees, page 124:

> "There is no basis in the Wagner Act (29 U. S. C. A. § 151 *et seq.*) for the Board to compel an employer to take back employees who have voluntarily refused to return to their jobs after being temporarily laid off for cause, *and who have, while laid off, indulged in unlawful acts,* such as attempting to incite their fellow employees to indulge in a 'sit-down strike,' *or any other unlawful acts.* The reinstatement in such case is not a matter of discretion, as the court stated in the *Fansteel* case."

In addition to the holding that, in view of the *Fansteel* case, *any* unlawful acts directed at the employer disqualify employees from reinstatement, it does not appear that these employees were convicted of crimes in this respect. This decision obviously is in conflict with that of the court below in this case.

The public and general importance of a decision by this Court of this phase of the case is too obvious to require comment.

III.

The court below erroneously decided an important question of federal law, relating to the construction and application of a federal statute, which has not been, but should be, settled by this Court, when it held that Section 6 of the Norris-LaGuardia Act (29 U. S. C. A., Sec. 106), providing that no member of any association participating in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individ-

ual members except upon clear proof of actual participation in such acts, applied to this case, and prohibited the court below from considering petitioner's contention that strikers could not properly be ordered reinstated generally by the Board, to effectuate the policies of the Act, in view of the principles announced by this Court in N. L. R. B. v. Fansteel Metallurgical Corp., supra, because they were all members of an illegal combination and conspiracy and, as such, responsible for the acts of violence committed, individually and collectively, in pursuance thereof.

Petitioner contends that the uncontroverted evidence shows that the strike was illegal in its inception and conduct; that its purpose was to paralyze petitioner's business operations, not by lawful pressure, in the nature of quitting work and peaceful picketing, but by concerted acts of violence directed to preventing ingress to and egress from petitioner's various plants and preventing its employees from going to and from work by means of terrorism and violence; that, under well established principles, all of the union members engaged in this unlawful combination were responsible for the unlawful and violent acts committed in pursuance of the combination, and that, therefore, the Board could not properly reinstate strikers, since this would not "effectuate the policies of the Act" in view of the principles laid down by this Court in *N. L. R. B. v. Fansteel Metallurgical Corp., supra.* The Board refused to determine whether such a general combination existed, and the legal consequences thereof, in view of Section 6 of the Norris-LaGuardia Act (R. II, 1093), although it is expressly applicable only to "courts of the United States" and not administrative tribunals, and confined its consideration to acts of violence by individuals convicted therefor in the criminal courts (R. II, 1085)

The court below, instead of reviewing the Board's ruling that it could not consider this evidence, held that the court, itself, was prohibited from deciding whether or not there was an unlawful combination, and the legal conse-

quences thereof, because the Norris-LaGuardia Act "applies to this proceeding for the enforcement of the Board's order" (R. VIII, 6288).

Petitioner submits that this Court, in this case, should decide whether or not the Norris-LaGuardia Act applies to this proceeding, which, according to the court below (R. VIII, 6288), does not involve private rights, but is one in which a governmental agency makes, and seeks to enforce, its order in the public interest. The Norris-LaGuardia "anti-injunction" Act does not apply, specifically, to proceedings before the Board, and, we believe, was not intended to apply to proceedings, either before the Board or the Circuit Court of Appeals, the purpose of which is to determine whether Board action with regard to strikers will "effectuate the policies of the Act," and not to determine private rights of the strikers or the employer, except incidentally to the main purpose. On the contrary, Section 16 (h) of the National Labor Relations Act, Title 29 U. S. C. A. Section 160 (h) provides that "when * * * *making* and entering a decree enforcing * * * an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by Sections 101 to 115 of this title," (which includes Section 106 of the Norris-LaGuardia Act). This Court held in *Ford Motor Company v. N. L. R. B.*, 305 U. S. 364, that the proceeding before the Circuit Court of Appeals for enforcement of the Board's order is *equitable in nature.* If the Norris-LaGuardia Act is not applicable to the proceedings before the Board, then the Board must apply pertinent non-statutory principles of general law in determining what affirmative action will effectuate the policies of the Act. Certainly, the Court of Appeals must have jurisdiction to determine the legality of the Board's order in this respect.

This statute was enacted for the purpose of dealing with private rights in equitable injunctive, and, perhaps, in legal proceedings, and it is of paramount importance that

this Court decide in this case whether it applies in this special administrative proceeding. Here, the Board has made an order of general and indiscriminate reinstatement of strikers; and this being true, evidence of general and indiscriminate violence by strikers should be considered in determining whether such action as is ordered by the Board will actually effectuate the policies of the Act.

IV.

The court below erroneously decided an important question of federal law, which has not been but should be settled by this Court, when it sustained the Board's order, sections 2(b) (c) and (g), requiring petitioner to reimburse fiscal agencies for work relief projects for payments made by them to strikers and other employees for services actually performed on so-called work relief projects, which order is beyond the Board's jurisdiction, or, at least, an abuse of its discretion and punitive in character, and deprives petitioner of its property without due process of law.

By this order, which was made in this case for the first time, petitioner is required to deduct from the amount of money it might ultimately be required to pay to a striker denied reinstatement pursuant to the Board's order, and from amounts it is required to pay a discharged employee, such sums as have been paid to him by a work relief project for work which has actually been performed thereon (such as building roads, bridges, etc.), but petitioner must reimburse the work relief project for the amount it has paid the striker or employee, a process by which, in the last analysis, petitioner is compelled to pay the striker or employee for the work he has performed for another who receives the benefit and advantage of such work for nothing. The court below held that this order was "within the Board's discretion and not unreasonable," citing *N. L. R. B. v. Planters Mfg. Co., Inc.*, 105 Fed. (2d)

750, wherein the court approved, without comment,* a Board order containing such a provision.

This order is not "a means of removing or avoiding the consequences of violation" of the Act, *N. L. R. B. v. Fansteel Metallurgical Corporation, supra,* because payment to the project does not restore the striker's status quo, but merely *improves the project's status.* It will not effectuate the policies of the Act by fostering collective organization or preventing strikes, for, obviously, the striker is not interested in the disposition of moneys deducted from his back pay, and the order is punitive and not remedial in character, and, therefore, beyond the authority of the Board, if enforced only to restrain an employer from causing strikes for fear that this consequence, i.e., reimbursement of work relief projects for moneys paid by them to strikers, will be visited upon him. On the contrary, it will "thwart the purposes of the act." Since WPA cannot furnish work to all applicants, officials seeking to reduce costs of projects naturally will tend to prefer strikers, in view of the possibility of obtaining a return of amounts paid, and this, in turn, will tend to encourage employees to resort to industrial strife for the purpose of settling labor disputes, rather than the peaceable method of resort to the Board. Payments for work performed for relief projects, such, for instance, as WPA, are not merely charitable in their nature but are for work actually performed. As stated in *Block v. Sassaman,* 26 Fed. Sup. 105, 106:

> "* * * While the activities of the Works Progress Administration result in what has been commonly known as 'made work,' the appropriations to sustain the same are not grants for direct relief purposes, but are made for the purpose of furnishing employment to

* Upon inquiry we were informed by counsel for Planters Mfg. Co. that this point was not raised or argued due to insignificance of the amount involved.

needy and qualified persons *with the intention that remuneration is to be given to those who render an actual service in their employment.*"

There is no more reason for requiring petitioner to reimburse these former employees than there is for exacting the same requirement as to private employers for whom the strikers may have worked.

If it is suggested by counsel for the Board, as it was in the court below, that the Board had discretion to order payment of back pay without deduction of amounts earned by employees during the period for which the back pay is awarded, and, therefore, the order that amounts received from work relief projects be deducted and paid to such projects by petitioner is of no concern to petitioner, it is clear that petitioner *is* concerned, since the jurisdiction conferred upon the Board is "remedial, not punitive," *N. L. R. B. v. Fansteel Metallurgical Corporation, supra,* and merely extends, in so far as back pay is concerned, to putting the employee in *statu quo.* Therefore, the Board has *necessarily* deducted amounts earned from back pay awarded, not discretionarily, and its order that petitioner pay to projects what it could not require petitioner to pay employees is punitive and beyond its jurisdiction.

The Board's theory in this respect is that "to hold that the losses accruing from the respondent's unfair labor practices must be borne by the government or governments financing the work relief project would not effectuate the purposes of the act" (II, 1096). This does not constitute the necessary positive finding that reimbursement of the project will effectuate the policies of the Act, *which are to foster collective organization, not work relief projects,* and to prevent strikes tending to interfere with interstate commerce. However, it is clear that the Board's theory is faulty because theoretically there is no "loss" to the project. The theory must be based upon the premise that if the employee's work had not ceased as a result of the

employer's unfair labor practices he would not have been employed upon the work relief project, in other words, that his work would not have ceased as a result of natural causes other than unfair labor practices. Otherwise, the "loss" resulting from his employment by the project would not be attributable to the employer's unfair labor practices. If the job continued, it must be assumed that some one was employed to take the employee's place who would otherwise have been unemployed and would theoretically have been reemployed by the work relief project. Therefore, the project suffers no "loss" because if it had not employed the employee, it would have employed the person who was employed to take his place. Furthermore, the work relief project does not sustain any "loss" in the amount of wages paid to workers, because the government receives "value" for their work.

The validity of such an order was doubted by the majority of the court, citing 53 *Harvard Law Review* 141, but expressly not decided because not argued, in *N. L. R. B. v. National Casket Co., Inc.*, 107 Fed. (2d) 992, 998. L. Hand, *C.J.*, dissenting, joined "in my brothers' caveat" as to this provision of the order (p. 999).

In so far as this order requires petitioner to pay for work done for the benefit of the agency, for which petitioner did not contract, its enforcement will tend to deprive petitioner of its property without due process of law.

The importance to the public of a final determination of this question by this Court, since the Board's practice here sanctioned by the court below has become standard,* is obvious in these times of labor unrest and widespread unemployment.

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* Examination of bound volumes IX through XII of the official reports of the Board (Oct. 1, 1938 through May 31, 1939), discloses that from Oct. 18, 1938, the date of the Board's order herein, through May 31, 1939 this provision was included in 67 orders.

V.

The decision of the court below requiring petitioner to make whole certain of its employees at its Canton tin plate mill and Massillon works plants who were found to have been locked out for a short time but who were re-employed prior to the strike and the Board's hearing, for the pay lost during such alleged lockouts, when the Board and the court below did not, and could not, reinstate such employees in connection with this pay back order, is in conflict with the decision of the Ninth Circuit Court of Appeals in N. L. R. B. v. Carlisle Lumber Co., 99 Fed. (2d) 533; and such holding of the court below is also in conflict with the decision of this Court in N. L. R. B. v. Sands Manufacturing Co., 306 U. S. 332, in that it depends for its support upon alleged statements by petitioner's minor supervisory employees, not authorized to determine its labor policies, and, therefore, not substantial evidence.

The Board's order, sections 2 (d) and 2 (e), requires petitioner to make whole, by paying them for the time they were without work, certain of its former employees at its Canton tin plate and Massillon works plants, based upon a finding by the Board that petitioner locked out these employees for the purpose of discouraging membership in SWOC. The Canton plant was closed from May 5th until May 24th, 1937 and the Massillon plant from May 20th to May 23rd, 1937, *supra,* pages 22, 23. The strike commenced on May 26th, 1937, and before it was called such employees had returned to work, so that no question of their reinstatement in connection with this back pay order could be presented.

The Board's order was made pursuant to Section 10 (c) of the Act, by which it is empowered to require the employer to take such affirmative action, "including *reinstatement* of employees *with or without back pay* as will effectuate the policies of this Act."

In *N. L. R. B. v. Carlisle Lumber Company*, 99 Fed. (2d) 533, *supra*, the court said at page 537:

"A more critical examination of the reinstatement provision is required by the contentions of respondent. The statute says that the Board may order 'reinstatement of employees with or without back pay.' *While the act permits the Board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement, because the back pay provision is connected with and dependent upon the reinstatement provision.* It can be seen from the quoted portion of the committee report, that the provisions were not placed in the act specifically to benefit employees, although they may have such effect, but were designed to insure that an employer would cease unfair labor practices. In other words, I think Congress was dealing with causes of obstructions affecting commerce, and not with the relationship of master and servant as such. For these reasons, I decline to follow *Mooresville Cotton Mills v. National Labor R. Board*, 4 Cir., 94 F. 2d 61, 66. It was there said that back pay might be awarded without reinstatement because it 'would not offend the terms of the act, would do justice to the worker, and would tend to effectuate the policies of the act.' I think such a construction offends the terms of the act, and what would effectuate the policies of the act is a legislative question for the Board, subject only to the constitutional prohibitions applicable to all such administrative agencies. It may be that such an order could be said to 'do justice to the employee,' yet I think that the real purpose of the statute was to deal with obstructions affecting commerce and that such purpose must be controlling in a construction of the act.

"The only apparent basis for a construction which would permit 'back pay' without reinstatement is by considering that such power arises from the Board's power to order a person guilty of unfair labor practices 'to take such affirmative action * * * as will effectuate the policies of this Act' independently of the words omitted from that quotation, which are: 'including reinstatement of employees with or without back pay.'

*I believe that since 'reinstatement' and 'back pay' were singled out for special treatment, it was intended that the general words were to be limited thereby.'"**

The foregoing quotation shows that Judge Haney, delivering the opinion of the court, announced a decision contrary to the decision of the court in the case at bar enforcing an order for back pay periods with regard to which no reinstatement could be ordered. It is true that Judge Stephens, concurring, stated that he saw no reason in that case to determine this question, page 543, but Judge Wilbur concurred in the order "which has its source *in the majority opinion* herein" (page 544). Under these circumstances the decision of the court in the *Carlisle Lumber Company* case is in conflict with the decision of the Circuit Court of Appeals in the case at bar on this point.

We respectfully submit this Court should, for that reason, consider and decide the question thus presented and put an end to the conflict because, obviously, the question is one of general importance and substance which is sure to arise frequently in cases of this character.**

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* It would seem that if Congress had intended to confer jurisdiction upon the Board to order "back pay" without "reinstatement," it would have so provided. The court in the *Carlisle Lumber Company* case, *supra*, pointed out, page 538, that

"* * * the bill as originally introduced (S. 2926, 73rd Cong.) provided: 'The order may require such person to cease and desist from such unfair labor practice, *or* to take affirmative action, *or* to pay damages, *or* to reinstate employees * * *.'"

Obviously, reinstatement and payment of damages were disjunctive in the bill as originally drawn. If it had been intended that reinstatement and "back pay," which apparently later took the place of "damages," had been intended to be in the disjunctive, Congress would have enacted the law in its original frame work. The language of the Act must be reversed to read "including back pay with or without reinstatement" to be construed as in the case at bar. This would be judicial legislation, not interpretation.

** The question here raised relates likewise to certain employees found to have been improperly discharged or laid off and who were reinstated and actually at work when the strike was called, who were awarded back pay for the period of the discharge or lay off by Section 2 (c) of the decree (R. VIII, 6296).

It appears from the discussion of the facts, *supra* page 22 *et seq.*, that the finding of the Board, sustained by the court below, that these plants were shut down so as to discourage membership in the union, depends entirely for its support upon alleged statements of petitioner's minor supervisory employees, having no authority whatsoever to determine its labor policies, to the general effect that the plants were shut down to discourage union activities, and is, therefore, in conflict with the decision of this Court in *N. L. R. B. v. Sands Manufacturing Co.*, 306 U. S. 332, wherein this Court held that statements by a foreman and a superintendent did not constitute substantial evidence of the labor policies of the employer therein involved.

VI.

The court below erroneously decided an important question of Federal law, which has not been, but should be, settled by this Court, when it approved and enforced Section 2(f) of the Board's order by which petitioner is required to reinstate strikers in certain of its plants in Ohio, and at Monroe, Michigan and at Pittsburgh and Beaver Falls, Pennsylvania, located, in some instances as much as approximately 130 miles apart, and at new plants of petitioner acquired since the date of the hearing, REGARDLESS OF THEIR PLACE OF FORMER EMPLOYMENT.

Section 2 (f) of the Board's order, enforced by the court below, ordered that reinstatement of the strikers should be effected by reinstating each striker to his former or substantially equivalent position in the plant where he was employed at the time of the strike; that, in the event there were insufficient positions available, all or as many as might be necessary of the new employees hired subsequent to the strike to be dismissed to make positions for the strikers ordered reinstated; that in the event that, after such dismissal of all new employees, insufficient positions remained to reinstate all strikers ordered reinstated, all

available positions should be distributed among those ordered reinstated and other employees not so required to be dismissed in accordance with petitioner's usual method of reducing its force without discrimination because of union affiliation and following a system of seniority to such extent as had theretofore been applied in the conduct of petitioner's business. The foregoing provisions were limited in application to the plants where strikers ordered reinstated had been employed prior to the strike. This section of the order then directed that any employees, remaining after such reduction, for whom there were then no available positions, should be placed upon a preferential list prepared in accordance with the principles set forth above, and should thereafter, in accordance with such list, be offered employment in their former or substantially equivalent positions at any of petitioner's plants (including plants acquired since the date of the hearing from petitioner's subsidiaries or otherwise) in Ohio, Monroe, Michigan, and in Pittsburgh and Beaver Falls, Pennsylvania, regardless of their previous place of employment, as such employment becomes available, and before new employees are hired for such work.

The Ohio plants are located within a maximum radius of 70 miles from each other, but the Michigan and Pennsylvania plants included in the Board's order are located approximately 130 miles from some of the Ohio plants.

Ordinarily, an employee laid off at Canton, Ohio, would have no seniority right to be employed at Beaver Falls, Pennsylvania, but must be rehired as a new man, if at all. Under this order, a new seniority for strikers at the Ohio plants involved in this proceeding is created which, in effect, gives strikers seniority, not only at all of petitioner's Ohio plants, but also at the Michigan and Pennsylvania plants covered by the order, and requires petitioner, in filling a vacancy at its Beaver Falls, Pennsylvania, plant,

more than 130 miles from Canton, to offer the position to the Canton employee, if he is next in line, before any one else is employed.

The enforcement of this order will not, as was suggested by the Board, tend to remove the consequences of petitioner's alleged violation of the Act by restoring the *status quo*, but it will thwart and obstruct the policies of the Act as a matter of law, by giving to the employee, *as a striker*, greater rights than he would otherwise have had as an employee, *thus putting a premium upon his participation in strikes*, which it is the fundamental policy of the Act to avoid. The court below relied on *N. L. R. B. v. Remington Rand, Inc.*, 94 Fed. (2d) 862, in which, however, a "runaway plant" was involved, reinstatement at which merely restored the employees' *status quo*.

The inequitable and punitive character of this order is further emphasized by the fact that, by its terms, it is made applicable to certain of petitioner's plants which were not in existence at the time the strike occurred. In *N. L. R. B. v. Hearst*, 102 Fed. (2d) 658, the Ninth Circuit Court of Appeals held that "reinstatement means to return to a post previously held" (page 663). Obviously, the order "instates" and does not "reinstate" employees in plants acquired by the petitioner since the date of the hearing.

VII.

The decision of the court below, holding that certain employees of petitioner who were not named in the charges filed by the Board could be ordered reinstated, with back pay, and finding that the strike was caused by unfair labor practices other than those alleged in the charges as causes of the strike, is in conflict with the decision of the Second Circuit Court of Appeals in N. L. R. B. v. Hopwood Retinning Company, Inc., 98 Fed. (2d) 97.

The Board, and the court below, found that certain employees, who were not referred to as having been discrim-

inatorily discharged in the charges, filed by SWOC and upon which the present proceeding is based, had been discriminatorily discharged by petitioner and ordered their reinstatement with back pay.

The Board, and the court below, found that the strike was caused in part by petitioner's "campaign to crush the union" whereas the charges filed by SWOC charged only that it was caused by discharges of certain employees and the alleged lockout at the Canton tin plate mill on May 5th.

Section 10 (b) of the Act provides that "Whenever it is charged" that an unfair labor practice has been committed, "the Board, or its agency, shall issue" a complaint "*stating the charges* in that respect." In *N. L. R. B. v. Hopwood Retinning Company, Inc.*, 98 Fed. (2d) 97, the Second Circuit Court of Appeals held that no order could be made against a company against which no charges had been made because, in view of the provision of the Act that the Board's complaint should "state the charges," "the Board cannot use its own initiative in respect to charging unfair labor practices" (page 101). While the facts patently are not the same, the principle applicable is, and it is apparent that the decision of the court below in the case at bar is in conflict with the decision in the *Hopwood* case.

VIII.

The court below decided an important question of Federal law which has not been, but should be, settled by this Court, when it upheld the Board's finding that petitioner had committed unfair labor practices as defined by Section 8 (3) of the Act when it discharged and refused to reinstate twenty-six of its former employees, notwithstanding that there was no evidence tending to show that such acts actually discouraged membership in a labor organization by either causing employees to withdraw therefrom or to refrain from joining it.

The court below found (R. VIII, 6283) that the findings of fact by the Board were supported by evidence, and that "They in turn fully support the conclusion of the Board that Republic had engaged in unfair labor practices within the meaning of Section 8, subsections (1), (2) and (3), of the Act * * * (3) *by discriminating in regard to the hire and tenure of employment of the twenty-six employees above mentioned,*" who had been discharged before the strike or refused reinstatement after the strike.

The Act, properly interpreted, requires that the Board find from substantial evidence, that the employer has discouraged membership in a labor organization by discrimination with regard to the tenure of employment, and not merely that the employer has discriminated with regard thereto, before the Board can conclude that the employer has committed an unfair labor practice as defined in Section 8 (3) of the Act; and the discouragement must be such as to actually induce employees to either refrain from joining the union or to discontinue membership therein. This is implicit from the provisions of Section 8 of the Act that:

> "It shall be an unfair labor practice for an employer—
>
> "(3) *By discrimination* in regard to hire or tenure of employment or any term or condition of employment *to* encourage or *discourage membership* in any labor organization: * * *."

There is no evidence in the record showing that employees refrained from joining SWOC as a result of petitioner's alleged discharges or refusals to reinstate, or that employees withdrew from SWOC as a result. It is true that the Board found, generally, that petitioner had discriminated against these employees "in regard to hire and tenure of employment, thereby discouraging membership in a labor organization" (R. II, 984, 1003, 1041, 1062); however, an examination of the evidential findings discloses that there was no basis therein for these ultimate findings, but that they were merely formal in nature, and based,

apparently, upon the assumption that, since petitioner had discriminated against these employees, it necessarily followed that it had discouraged membership in a labor organization. The court below so interpreted the Board's findings, see emphasized language, *supra*, page 55.

Discouragement of membership in a labor organization is clearly a matter of affirmative proof in each case by the Board, upon which the burden of proof is cast, not invalid inference from proof of discrimination alone. Obviously, discrimination may, or may not, discourage membership.

This question has not been decided by this Court. It arose in *National Labor Relations Board v. National Motor Bearings Company*, 105 Fed. (2d) 652 in which Haney, *J.*, dissented from the order of the majority, requiring reinstatement of certain employees, on the ground that the Board had made no finding that their discharge resulted in actually discouraging membership in the union, and that this was not the necessary inference from the record (pages 664, 665). The interpretation of Section 8 (3) for which we contend is supported in 48 *Yale Law Journal* 1152, 1154.

The importance of determination of this question of interpretation of the Act need hardly be emphasized.

IX.

The decree of the court below, enforcing the Board's order notwithstanding petitioner was never afforded a hearing as to the charges made against it in the complaint, denies petitioner due process of law, and is in conflict with the decision of this Court in Morgan v. U. S., 304 U. S. 1.

The facts as to this point are set forth *supra*, page 8, disclosing that petitioner was not afforded any opportunity whatsoever to make an oral argument, to file a brief or to contest the charges made against it in the complaint before the Board issued its first final decision and order on April 8, 1938; that subsequent regularizing proceedings resulted in no substantial change beneficial to petitioner. Petitioner contends that in this situation it never

was afforded a hearing as to the charges made against it in the complaint, as is guaranteed to it by the due process clause of the Constitution; that the Board made up its mind as to every issue and question of law and fact herein involved without affording the petitioner any opportunity to present an oral argument, file a brief or in any manner contest the charges made against it; that the withdrawal of its order by the Board was nothing more nor less than an attempt to regularize its original findings, etc. so as to avoid the application of the rule announced by this Court in the *Morgan* case, wherein it said: *"The 'hearing' is the hearing of evidence and argument.* If the one who determines the facts which underly the order has not considered evidence *or argument,* it is manifest that the hearing has not been given." A "hearing" before a Board which has already made up its mind as to every question of law and fact involved in the case is, we respectfully submit, not a hearing which amounts to due process of law.

It is true that petitioner made no request for an opportunity to submit oral argument and briefs before the Board prior to its first decision and order. However, petitioner was justified in assuming that the Board would "notify the parties of the time and place of such submission of briefs, oral argument or taking of further evidence," in view of the peremptory provisions of Article II, Section 38 of its rules which provides, *inter alia,* that, when the Board has permitted a charge to be filed with it (as was done in the case at bar), it may direct the Trial Examiner to prepare an intermediate report or decide the matter forthwith upon the record, or upon the filing of briefs or oral argument. This Court held in *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, that such an assumption was not permissible after a brief had been filed with the Trial Examiner if an *"additional* hearing" was desired before the Board, but has not decided whether it is permissible when no brief was filed or oral

argument or hearing afforded either before the Trial Examiner or the Board.

This, we believe, is the first of the cases in which the Board withdrew its order for further proceedings induced by the decision of this Court in *Morgan v. United States, supra,* coming before this Court for review, and we suggest that it is important that this question be decided here.

X.

The court below, in holding that the Board, in ordering petitioner to cease recognition of certain independent unions, need not consider evidence that thousands of employees joined these unions of their own free will and were not influenced, in so doing, by anything that petitioner or its officers or agents said or did, decided an important question of law arising under the Act which has not been, but should be, settled by this Court.

The facts with regard to this evidence are stated *supra,* page 24.

While this Court has held that it is not improper for the Board to order withdrawal of recognition from an independent union, after consideration of evidence indicating that members of the union are satisfied with it, *N. L. R. B. v. Newport News Shipbuilding & Dry Dock Company,* — U. S. —, 60 S. Ct. 203, we know of no case in which this Court has held that the Board and the lower court need not consider evidence demonstrating lack of coercion in determining whether or not the withdrawal of recognition should be ordered. Certainly, this is the best evidence as to whether the employer has "dominated, interfered with, or assisted" the organization of the independent union, since the state of mind of employees joining the union is obviously the nub of the controversy. The court below, in *N. L. R. B. v. Swank Products, Inc.,* (C. C. A. 3, Dec. 29, 1939), — Fed. (2d) —, held, subsequent to and *contrary to its holding herein,* that its conclusion that the employer

merely acquiesced in, and did not wrongfully dominate, organization of an unaffiliated union of its employees, was "* * * *reenforced* by a stipulation of counsel that members of the Association, if called, would have testified that they joined without interference or coercion and that their preference was for the association, and not for either the C.I.O. or the A. F. of L.," thus holding that such evidence was competent, relevant and admissible.

Obviously, the admissibility of such evidence is a question of great importance in the administration of the Act.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

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APPENDIX.

APPLICABLE PROVISION OF THE NORRIS-LaGUARDIA ACT.

Title 29 U. S. C. A. Section 106, c. 90, Sec. 6, 47 Stat. 71:

"SEC. 106. *Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members and agents.* No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. (Mar. 23, 1932, c. 90, Sec. 6, 47 Stat. 71.)"

APPLICABLE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

Title 29, U. S. C. A. Section 151 et seq., c. 372, Sec. 1, 49 Stat. 449, et seq.:

"SEC. 151. *Findings and declaration of policy.*

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by

depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (July 5, 1935, c. 372, Sec. 1, 49 Stat. 449."

"SEC. 152. DEFINITIONS.

"When used in sections 151 to 166 of this title—

* * * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 158 of this title.

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

"SEC. 157. *Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, joint, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. (July 5, 1935, c. 372, Sec. 7, 49 Stat. 452.)"

"SEC. 158. *Unfair labor practices by employer defined.*

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this chapter, or in sections 701 to 712 of Title 15, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this chapter as an unfair labor practice) to require as a condition of employment membership therein, if such labor

organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made. * * *"

"SEC. 160. *Prevention of unfair labor practices.*

"(a) *Powers of Board generally.* The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

"(b) *Complaint and notice of hearing; answer; court rules of evidence inapplicable.* Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

"(c) *Reduction of testimony to writing; findings and orders of Board.* The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint

has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

"(d) *Modification of findings or orders prior to filing record in court.* Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) *Petition to court for enforcement of order; proceedings; review of judgment.* The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

"(f) *Review of final order of Board on petition to court.* Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the find-

ings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

"(g) *Institution of court proceedings as stay of Board's order.* The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

"(h) *Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title.* When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title."

"SEC. 163. *Right to strike preserved.*

"Nothing in this chapter shall be construed so as to interfere with or impede or diminish in any way the right to strike. (July 5, 1935, c. 372, Sec. 13, 49 Stat. 457."

APPLICABLE PROVISIONS OF THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD AS AMENDED APRIL 27, 1936.

Article II, Sections 37 and 38:

"SECTION 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto

"(a) be transferred to and continued before it, for the purpose of consolidation with any proceeding which

may have been instituted by the Board, or for any other purpose; or

"(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same Region; or

"(c) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

"The provisions of Sections 3 to 31, inclusive, of this Article shall, insofar as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

"Section 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may

"(a) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

"(b) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

"(c) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

"(d) make other disposition of the case.

"The Board shall notify the parties of the time and place of any such submission of briefs, oral argument or taking of further evidence."